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ABSTRACT

An analysis is presented of the "Bakke" decision and the several opinions of the Supreme Court Justices. The principal issue presented by the case is whether a higher education institution using a selective admission program may adjust that program by giving explicit preference to qualified members of identified racial or ethnic groups who would otherwise be denied admission. The circumstances are outlined in the application and rejection of Allan Bakke to the Medical School of the University of California at Davis. Bakke's Case in the Superior Court of California is analyzed and the considerations in the Supreme Court decision relating to violation of Title VI of the Civil Rights Act of 1965 are covered. The three principal opinions in the Supreme Court decision were by Justice Powell, one by Justices Brennan, White, Marshall, and Blackmun (each of the latter three also write separate opinions), and one by Justice Stevens (joined by Chief Justice Burger and Justices Stewart and Rehnquist). Implications of the decision that are discussed concern Title VI coverage, discretion in constructing admission plans. A basic conclusion to be drawn from this report is that the Supreme Court has recognized the authority of institutions of higher education to continue under certain circumstances their affirmative action programs. (SW)

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THE BAKKE DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS

Edited by

WAYNE McCORMACK

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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A REPORT OF THE ACE-AALS COMMITTEE ON BAKKE

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FOREWORD

We are pleased to present to the higher education community this analysis of Regents of the University of California v. Bakke. In expectation that the Supreme Court decision in Bakke would be significant to all institutions of higher education, we began in late 1977 to discuss possible responses with many associations, funding agencies and our other constituencies. From these discussions emerged a course of action for the American Council on Education, of which this project is a part. The Association of American Law Schools gladly joined in this project to assist not only their member schools but also the universities of which their members are a part.

This report is an analysis of the Bakke decision and the several opinions by the Justices of the Supreme Court. It seeks to assist educators and educational policymakers in understanding the Supreme Court's decision. We assume that many institutions will use the Bakke decision as an occasion to review the criteria and procedures of their admission programs. Therefore, this report analyzes the various objectives to be served by race and ethnic group-conscious admission programs and examines several models of admission procedures and criteria that might be used to serve these objectives.

A basic conclusion to be drawn from this report is that the Supreme Court has recognized the authority of institutions of higher education to continue under certain circumstances their affirmative action programs. ACE and AALS have supported their member institutions in their support of this commitment and continue to do so. The work of this committee, however, was undertaken with insulation from policy directives of both associations.

This report is neither an instrument of advocacy nor designed to supplant the consultation and deliberation on these matters that should take place within the institution by the president, dean, and faculty with the governing board and legal counsel.

The approach of this project was shaped by Professor Millard H. Ruud, Executive Director of the Association of American Law Schools. It has been carried out by the joint ACE-AALS Committee chaired by Professor L. Orin Slagle, the College of Law of the Ohio State University and President of the Law School Admission Council. Wayne McCormack, Associate Dean and Professor of the College of Law, University of Utah and former Associate Director of the Association of American Law Schools, has served as the Committee's reporter and as such has assumed the major responsibility for drafting the Committee's report. We are indebted to the members of the Committee, its Chairman and its Reporter for this outstanding report.

The Ford Foundation and Carnegie Corporation of New York have provided funding for the Committee's deliberations and the production of this report. For this we are grateful.

J. W. Peltason
President, American Council
on Education

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of American Law Schools

THE SETTING

The higher education community, even more than most segments of our society, awaited the outcome of the Bakke case with increasing tension. From September 1976 when the decision of the California Supreme Court was announced until June 1978 when the decision of the United States Supreme Court was announced, many groups and individuals thought, spoke and wrote at great length about how the case might be decided and what options might be open after decision. Observers were divided on whether the Court would, or even should, address in a thorough fashion the issues involved in race-conscious admissions. Five years had intervened since the Court had failed to confront those issues in holding a similar case to be moot in DeFunis v. Odegaard. Some observers believed the time was at hand to lay this controversial problem to a legal rest while others believed good reasons existed for continuing the Court's silence.

The Supreme Court did address the validity of race-conscious admissions, but it did not speak with a single voice in Bakke. The Court's holding on the central issues must be derived from six different opinions because there was no opinion of the Court. This fact plus the reticence of some Justices on some issues leaves many questions unanswered. Because this was the first occasion for the Supreme Court to enter this difficult area, it is not surprising that it would leave many questions for further development in later cases. And because the problems are largely social and political in nature, it is also not surprising that the Court would leave substantial latitude for educational and governmental leadership to be exercised. Nevertheless, two points seem relatively clear from the

decision: (1) In public institutions subject to Title VI, a two-track admission program in which a specific number of seats is reserved exclusively for applicants from designated minority groups is impermissible in the absence of appropriate legislative, judicial or administrative findings; (2) A properly constructed race-conscious admission program is legally permissible under certain circumstances.

The principal issue presented by the Bakke case is whether a higher education institution using a selective admission program may adjust that program by giving explicit preference to qualified members of identified racial or ethnic groups who would otherwise be denied admission. While it may be obvious, we feel compelled to make the point that unless a school's admission criteria, whether they relate to academic potential or other attributes, have an impact on the racial or ethnic composition of its student body that the school deems undesirable, there would be no occasion for giving preference to members of certain groups. If, for example, a school could admit all applicants, it would have no reason to give admission preference to any applicant. When the school sets minimum standards for admissibility, the possibility arises that those standards will have a disparate impact on certain groups, including groups defined by such widely divergent factors as geographic origin, prior training and ethnic background. As a school is compelled to select from among the admissible applicants, the potential for disparate impact in its admission process increases.

In particular, experience of recent years in higher education shows that any set of criteria designed to predict academic performance, whether those criteria consist solely of quantified scores or include nonquantified data, will

have a disparate effect on certain groups that have been the victims of widespread discrimination in our society. Failure to consider the race of applicants thus may yield a lower number of students from those groups than the school considers desirable. Although the problem is heightened as the size of the applicant pool increases and individualized decisions are harder to make, the disparate effect can still be seen in almost all levels of higher education. The issue is whether this effect, whatever its dimensions, may be overcome by adding race or ethnic background as an explicit admission criterion.

It is elemental that educational institutions are free to make admission choices as they wish unless some rule of law intercedes to place limits on the range of available choices. The Supreme Court has left a great deal of room for institutions to make decisions in this area and an even greater latitude for judicial, legislative and administrative decision. The Court did not decide a number of issues that could have been resolved.

At the outset, we should delimit the subject matter. We have taken our mandate to include not only discussion of race-conscious admissions but also financial aid because the two seem closely related. Beyond that, however, we have limited our discussion rather tightly. Among topics that may be important but that are outside the scope of this report or the Court's disposition of the case are the validity of sex-conscious admissions, publication of admission criteria, due process in admissions, the role of historically black institutions, academic employment and admission preferences of nonracial nature. Of course, many bases of preference other than racial or ethnic, such as athletic ability or alumni relationships, have long been a part of selective

admissions, and neither Bakke nor our discussion is addressed to issues raised by those bases of preference.

The facts in this case. To understand the Court's treatment of the issues in Bakke, it is necessary to state once again the facts on which the Supreme Court was operating. The Supreme Court's perception of the facts is the significant operative element and we will therefore draw extensively from Mr. Justice Powell's statement of the undisputed facts. Disputed factual matters will be left for later development.

Shortly after the Medical School at Davis opened in 1968, the faculty devised a special admission program for "disadvantaged" applicants, operated in coordination with the regu- admission process. Applicants considered under the regular admission system initially were screened on quantitative data before further consideration, and applicants with less than a 2.5 undergraduate grade point average were summarily rejected. The next stage involved comparative assessment of admission credentials (primarily test scores and grade point averages). A candidate surviving this screening was invited for an interview and was assigned a "benchmark" score which "embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, and scores on the Medical College Admissions Test (MCAT), letters of recommendation, extracurricular activities, and other biographical data."

The special admission program used a separate committee, a majority of whom were members of minority groups. The chairman of the committee prescreened applicants to determine whether they were eligible for consideration by the special admission committee. This screening was based on whether, "among other things, the applicant had been granted a waiver of the school's application fee, which required a means test;

whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group," which apparently included only Blacks, Chicanos, Asians, and American Indians. The applicants were rated by the special committee in the same manner as applicants were rated by the regular committee, "except that special candidates did not have to meet the 2.5 grade point average cut-off applied to regular applicants." The special committee presented "its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants. . . . The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was eight; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16."

"Although disadvantaged whites applied to the special program in large numbers, . . none received an offer of admission through that process." On the other hand, some members of the identified minority groups were admitted through the regular admission process.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In each year, his application was considered by the regular admission committee and, in each year, he received an interview. He applied late in 1973 and was rejected. "There were four special admissions slots unfilled at that time, however, for which Bakke was not considered." He was rejected again in 1974. "In both years, applicants were admitted under the special admissions program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."

After the second rejection, Bakke brought suit in the Superior Court of California. The trial court declared that the University could not take race into account in making admission decisions and held that the program violated the Federal Constitution, the state constitution and Title VI of the Civil Rights Act. "The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program."

Both Bakke and the University appealed. The Supreme Court of California addressed neither the state constitutional nor federal statutory grounds. That court read the equal protection clause of the fourteenth amendment as prohibiting any applicant from being "rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race." The California Supreme Court placed the burden of proof on the University instead and ordered a remand "for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or 1974 entering class in the absence of the special admissions program. . . . In its petition for rehearing below, however, the University conceded its inability to carry that burden. . . . The California Court thereupon amended its opinion to direct . . . Bakke's admission to the medical school." The Supreme Court of the United States stayed the order pending review and, in 1977, granted the University's petition "to consider the important constitutional issue." After oral argument, the Court requested additional briefs on the applicability of Title VI of the Civil Rights Act of 1964.

Fourteenth Amendment and Title VI. The text of the crucial language of the pertinent constitutional and

statutory provisions are as follows:

The equal protection clause of the fourteenth amentment provides:

> *[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.*

Title VI provides in pertinent part (section 601):

> *No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.*

The phrase "race conscious admission program" is used throughout this report to refer to a program that takes race or ethnic background into account.

THE OPINIONS OF THE SUPREME COURT

There were three principal opinions in Bakke: one by Justice Powell, one by Justices Brennan, White, Marshall and Blackmun (each of the latter three also wrote separate opinions), one by Justice Stevens (joined by Chief Justice Burger and Justices Stewart and Rehnquist). The Stevens group decided only that Allan Bakke had been "excluded from participation in a federally funded program of medical education because of his race" in violation of Title VI of the Civil Rights Act of 1964. The Brennan group determined that neither Title VI nor the equal protection clause of the Constitution prohibited the adoption of an admission program that reserved a specific number of places for qualified members of minority groups. The Stevens group concurred with Justice Powell to decide that the Davis Medical School system of minority admissions had illegally excluded Bakke, but the Brennan group concurred with Justice Powell to decide that there are circumstances under which a properly constructed race-conscious admission program is valid. Justice Powell and the Brennan group differed in defining the ingredients of a valid program.

Two fundamental points apply in all the opinions. First, the equal protection clause applies only to state action. The relation of a private institution to the state through funding or otherwise may be such that its action is considered state action and the equal protection clause thus held applicable. Secondly, racial and ethnic bases for distinction among persons is viewed by courts differently from other bases. Race is said to be a suspect classification. Today's concern to promote equality and to prevent social divisiveness requires that when race is used judicial scrutiny of the classification be closer than

when less sensitive factors are used. Any level of judicial scrutiny under the equal protection clause involves an examination of the objectives and the means chosen to attain those objectives. Opinions may differ on how close the scrutiny should be, but the basic points are rarely disputed.

A. The Stevens Group

Justice Stevens first insisted that the case posed only a single question. That question was whether Bakke was entitled to be admitted to medical school. All other questions he considered to be immaterial. For that reason, he insisted that it was inappropriate for Justice Powell to address the use of race in any fashion other than its use in the Davis plan. "It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate." These four Justices did not address any constitutional issues nor the validity of other admission programs not before the Court. These are important reservations for future cases and this discussion. Justice Stevens wrote that the Court decides cases whenever possible on statutory rather than constitutional grounds.

After quoting Title VI, the opinion sets out in one paragraph the essential conclusion of this group of Justices:

> *The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be*

> *justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.*

The opinion does not disclose which particular features of the Davis plan were believed to render it invalid. There is language in the opinion that could be read to foreclose the use of race under any circumstances and some observers have so read it. In light of the opinion's reservation of this question, however, it must be assumed that members of the Stevens group have left open the question of the validity of other race-conscious admission plans even when covered by Title VI. The Stevens opinion thus may be read narrowly as applying only in the context of the University's concession that it could "not meet the burden of proving that the special admission program did not result in Bakke's exclusion."

B. The Brennan Group

The Brennan group read Title VI and the equal protection clause to mean the same thing. They determined that race-conscious admission programs would be valid under both provisions if the programs satisfy a three-prong test: First, "a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." Secondly, a racial admission criterion must be "reasonably used in light of the program's objectives." Finally, race-consciousness must not be used in a way that "stigmatizes any discrete group or individual."

The first prong of this test, disparate racial impact reasonably attributable to past discrimination, was met in the Brennan group's view by data on minority underrepresentation in the medical profession and pervasive discrimination resulting in lowered academic achievement by minority students to the extent that "in the absence of a special admissions program, access of minority students to the medical school would be severely limited."

The Brennan group concluded that the second and third prongs of their test were also met by the Davis program. They observed that the separate tracks for admission, one for regular admissions and one for the 16 special admissions, did not continue through school but operated to bring the races together once in school. Thus neither group would be stigmatized. The use of race in the context of the Davis program was deemed to be reasonable because no other method had been found to produce a significant number of minority students in medical school. In particular, Justice Brennan pointed out that a program based on "disadvantage" rather than race would very likely result in nonminority domination of the special admission program.

It is worth noting that the Brennan group's opinion, should it ever command a majority of the Court in the future, contains some limitations on the use of race-conscious admission criteria. For example, it would not permit the giving of a preference to members of an ethnic group which had not suffered past discrimination resulting in generally lower educational attainments. Nor would it permit a racial classification that stigmatized a particular group, as by segregating members of that group in a separate educational program.

C. The Powell Opinion

Mr. Justice Powell decided, as did the Brennan group, that Title VI and the Constitution imposed identical restraints upon race-conscious admission policies. He disagreed, however, with the Brennan group in defining those restraints. He concluded essentially that a school may not establish a special admission program under which non-minorities are excluded from competing for a certain number of places but that a school may use race as a factor in making admission decisions from among the entire pool of applicants.

On the exclusionary nature of the Davis program, Justice Powell first considered the argument that the Davis plan constituted a goal rather than a quota because the 16 seats were set aside only so long as qualified minority applicants were available and because additional minority students could be admitted through the regular admission process. "This semantic distinction is beside the point: . . . To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, while applicants could compete for only 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status."

Although the use of racial and ethnic criteria is not per se invalid, Justice Powell maintained, their use must be "precisely tailored to serve a compelling governmental interest." He therefore turned to the four objectives that were asserted by Davis to justify the use of race in its program. These were "(i) reducing the historic

deficit of traditionally disfavored minorities in medical schools and the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body."

Justice Powell dismissed the first objective in three sentences. "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

With regard to the second objective, Justice Powell noted that the state does have a "legitimate and substantial interest" in countering the effects of discrimination. He observed that the Board of Regents had not attempted and was "in no position" to make findings that would identify past discrimination and establish remedies precisely responsive to that discrimination. He reserved this function for judicial or legislative authority and those administrative bodies legislatively charged with the "authority and capability to establish, in the record, that the classification is responsive to identified discrimination."

With regard to the third objective, Justice Powell found no data in this case to demonstrate that members of particular ethnic groups would be likely to promote better health care delivery to residents of underserved communities.

He asserted that the University had "not shown that its preferential classification is likely to have any significant effect on the problem." In the absence of this proof, he concluded, the objective could not be sustained as a justification for a racial preference.

Justice Powell did conclude that the fourth objective could support a racial preference. He stated that the attainment of a diverse student body is a constitutionally permissible goal, supported by first amendment values embodied in the concept of academic freedom. In addition to the faculty's own first amendment interest in selection of students, he found that educational institutions produce the leaders of the future, that it is important for these future leaders to be exposed to a "robust exchange of ideas," and that a diverse student body will help promote that function. He acknowledged that these concerns might carry more force in undergraduate schools but maintained their importance at the graduate and professional level as well. For these reasons, Justice Powell concluded that the goal of promoting diversity in the student body was a compelling governmental interest and then turned to the final question of whether the reservation of a specified number of seats in each class exclusively for members of preferred ethnic groups was necessary to promote that interest.

Justice Powell stated that "petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity." In what may be

the key paragraph of Justice Powell's opinion, he described the kind of admission program that would meet his concept of diversity:

> *In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the fact of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class.*

This approach contains no judicial direction on which ethnic groups might be targeted for preference, unlike the Brennan

approach, which apparently would limit preferences to groups that had been the victims of past discrimination.

In conclusion, Justice Powell stated that the fatal flaw of the Davis admission plan was its exclusion of nonminority applicants from consideration for a specific percentage of the seats in the entering class. Because Bakke's rejection was attributable to an invalid policy, the Stevens group concurred with Justice Powell in holding that Bakke was entitled to an injunction ordering his admission to medical school. On the other hand, Justice Powell believed the courts below had erred in holding that race could never be considered in the admission process. Because "the state has a substantial interest that legitimately may be served by a properly devised program involving the competitive consideration of race and ethnic origin," the Brennan group concurred with Justice Powell to reverse the California court's judgment in this regard. On neither branch of the judgment did Justice Powell agree with the reasoning of the group of Justices who concurred with him.

IMPLICATIONS OF THE DECISION

In the immediate aftermath of the Bakke decision, many persons seemed to assume that Justice Powell spoke for the Court and that the impact of the case was to be gleaned from a reading of his opinion. If his opinion were accepted as the touchstone for decisions by the courts in future cases, then the initial message of Bakke would be fairly clear: reservation of a specific number of places in each entering class exclusively for students of designated minority groups, whether called a quota or goal, is prohibited while the use of race in a flexible admission policy designed to produce diversity in the student body on various factors is permissible. Justice Powell, however, has only one vote among nine on the Court, and he addressed only two of the many possible approaches to race-conscious admissions. Moreover, four members of the Court did not address the issue of the permissible use of race under the Constitution, while four others believed that the Constitution would permit more extensive use of race than did Justice Powell. Not one Justice stated that race may never be taken into account in the admission process. No Justice concurred in the Powell discussion of permissible and impermissible purposes. Under the circumstances, it is not at all clear what might be the result if the Court were faced with a slightly different admission plan or a similar plan under different circumstances.

Any of a number of factual variations from one case to another may affect the legal conclusions of a Justice. Presumably, it would not be legally significant to any Justice that a school reserved, for example, only 15 seats for minority students rather than 16 as Davis did. But a numerically stated range of expected minority admittees might be significantly different to a Justice from a

specific reservation of seats. The presence of many variables in the context of higher education admissions makes prediction for future litigation difficult. The following sections of this report address some of the variables, including objectives of special admission programs, that could be considered in any institutional review of an admission program. A brief treatment is given first to a variable that is less factual and less within the institution's control, the question of whether a school is covered by Title VI.

A. Title VI Coverage

The Stevens group joined in holding the Davis plan illegal only on the basis of Title VI. There is no way of knowing whether any or all of these Justices would have found the program invalid at a school not subject to Title VI; traditional doctrine permits construing a federal statute more restrictively than a corresponding provision of the Constitution. Other federal statutes may be brought to bear on these questions, but it is unlikely that any would be interpreted as restrictively as the Stevens interpretation of Title VI. Therefore, in assessing the range of choices open to a school, it may be important for that school to determine whether its admission policies are subject to Title VI.

Unfortunately, questions of Title VI coverage cannot be answered with confidence. Title VI is addressed only to programs or activities receiving federal financial assistance. The statute provides that funding may be termination or refused to any recipient that has been found not to comply, "but such termination or refusal shall be limited to the particular political entity, or part thereof,

or recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." It may be argued, however, that the statute prohibits discriminatory practices in programs other than those directly funded because of indirect financial benefits to such other programs or components of the university. For example, receipt of federal money by a university for the medical school may make Title VI prohibitions applicable to other programs within the university when it can be shown that those programs receive a financial benefit. Nevertheless, the few decided cases have tended to limit application of the statute to the specific program receiving federal funds.

Other uncertainties regarding Title VI are numerous. One coverage question being litigated now is whether receipt of federal aid by students is sufficient to make Title VI applicable to the schools in which they are enrolled because of the indirect benefit to the school through these funds.

The availability of private remedies under the statute is also still open. The four members of the Stevens group espoused the view that the University could not dispute the availability of a private action for the first time in the Supreme Court, Justice Powell and three members of the Brennan group believed the question to be immaterial in this case, and Justice White wrote a separate opinion denying the availability of a private right of action.

Because these and other complex issues in construing the statute have not been settled by the courts, schools concerned about their status should review the matter with legal counsel.

B. Discretion in Constructing Admission Policies

The opinions in Bakke leave broad scope for discretion to be exercised by an institution in constructing an admission policy and by faculty or staff in implementing that policy. Indeed, the basic message of the Court may well have been that the question of preferential admission is one best committed to the judgment of educational and legislative policy makers. The Court has invalidated only one particular admission plan, and four of the votes required for that conclusion were based solely on a legislative pronouncement of Congress (Title VI). In addition, Justice Powell wrote extensively of the need, in some instances, for appropriate legislative and administrative findings with respect to the need for special programs. These opinions, along with the Brennan group's deference to educational policy makers, signal the likelihood of increased reliance on informed discretion within educational institutions and their governing units. The Court has at most chosen only to chip away at the edges of that range of discretion.

1. Committee or administrative structure.

Institutional practices vary widely with regard to structure of the admission process. Some view the entire process to be exclusively administrative with little faculty input; others view it as administrative in operation subject to faculty policy control; others involve the faculty at every decisional stage including the reading of every applicant file. The Court has not addressed nor disturbed the scope of institutional choices in this division of responsibilities. Only Justice Powell commented upon the Davis committee structure as part of his decision, and that was in its splitting of the process into separate tracks for "minority" and "regular" admissions.

The invalidity of Davis' two-track system may not preclude delegations of authority to special committees or individuals with expertise in assessing applicants who are members of specified racial or ethnic groups. If these persons or groups perform only a screening function, reserving decision making power to the full committee or chief administrative officer, then the process is only a method of obtaining informed assessments on particular applicants. It may thus be viewed as part of an overall process designed to produce the individualized consideration that Justice Powell found so desirable.

Another approach used at some institutions is delegation of the decision making function to several persons or groups, each of which reviews and makes final decisions on a selected group of applications. If the assignment of applications to each entity involves no racial classification, then no equal protection objections in the Bakke sense arise. If, however, the assignment is made by racial or ethnic subgroup, then Justice Powell's concern about consideration of each applicant in comparison to all others becomes a problem.

2. Discretion in admission decisions.

At the level of individual admission decisions, the Court has also demonstrated an inclination to authorize a broad range of discretion by school authorities. The Brennan group would permit use of race in the admission process so long as its use is not demeaning to any particular group and is designed to redress past discrimination against the target groups. Justice Powell's description of an acceptable race-conscious program is one in which extremely broad discretion is vested in the admission authorities. The Stevens group did not address at all the issue of the use of race in a flexible, discretionary program. Thus no Justice spoke

against the use of race in a discretionary manner, and some members of the Stevens group might vote to uphold a broadly discretionary program even within the constraints of Title VI.

The courts have a long history of deferring to the judgments of an administrative officer so long as the office decision is within the range of discretion vested in his or her office. Lower courts have refused, for example, to review academic decisions on matters such as degree requirements and grades. In defining the permissible scope of an officer's discretion, however, it must be realized that certain types of decisions must be made within more narrow boundaries than other types.

The courts have, for some years now, consistently held that racial classifications and decisions based on race must be contained within relatively narrow bounds of discretion. Even outside the context of race, some writers have suggested that higher education admission decisions are sufficiently important that criteria of admission should be articulated and published to the most complete extent possible in an effort to confine administrative discretion. These considerations point out an inevitable tension between the concept of fairness, which implies uniformity in application of standards, and discretion, which implies informed judgment not bound by rigid standards. For Justice Powell and perhaps for other members of the Court, the scales tip toward the use of informed judgment rather than toward rigid standards in this instance.

C. Objectives of Race-Conscious Admissions

All five Justices who addressed the constitutional issues agreed that the structure and operation of a race-conscious admission plan must be related, with some degree of precision, to the objectives sought to be served by that plan. Because the legality of any particular plan will apparently be measured against its articulated objectives, a school might wish to consider adopting a description of its admission process, its standards or criteria, the objectives of its approach and the data to support each objective. At minimum, it is both legally and politically salutary for a school to engage in sufficient analysis of its admissions to be assured that the means chosen are tailored to supportable objectives.

Justice Powell discussed three objectives other than educational diversity that were offered by Davis in justification of race-conscious admissions, but he found each to be an inadequate basis for sustaining the Davis special admission program. Despite his opinion in this case, one or more of these could be persuasive in future cases if sufficient evidence were produced to justify pursuit of that goal. Massing this evidence could be important to schools that do not wish to pursue the approach approved by Justice Powell. His version of educational diversity requires a certain methodology in the admission process, a methodology that is expensive and arguably inefficient. Schools using other approaches will need to tailor their process to meet other objectives. Therefore, we will discuss briefly the evidentiary basis for pursuit of other objectives and then turn to models of implementation. Although the literature on this subject discloses many other goals to be served by race-conscious admissions, we believe that all can be subsumed under the four broad categories put forward by Davis.

1. Increasing minority representation in the professions

Justice Powell dismissed the goal of curing underrepresentation of minorities in the medical profession on the ground that the Constitution does not permit the granting of a preference to members of one group "for no reason other than race or ethnic origin." The Brennan group, on the other hand, seemed persuaded that gross underrepresentation of minorities in the medical profession resulting from past discrimination has a social impact that the state legitimately could attempt to redress. The other four Justices were silent on this issue.

This objective has several subelements, each of which could be asserted as a separate objective. Underrepresentation of minorities in the academic professions could stultify the educational process itself. To the extent that society remains stratified by educational achievements and with complete racial integration of society as a constitutional value, admission of minority group applicants to educational programs has some constitutional value. Minority professionals may be important as role models for minority youth as they attempt to determine their own self-images and to define their own desired roles in society, a process that has social and political implications for the state. (Justice Powell briefly discussed the role model objective but placed it under the heading of countering the effects of past discrimination.) Minority professionals might be expected to exercise leadership in capacities that the state could not expect to be well served in their complete absence. For example, lawyers are called upon to serve in governmental capacities as well as on various private and public governing bodies. Other professionals serve in these same roles as well as in governance of their own disciplines. The absence of minority representatives from these decision-making and opinion-shaping bodies could be shown to have a political impact,

attributable to discrimination against those minority groups, that the state could take an interest in avoiding.

Justice Powell gave no indication of why he was unpersuaded on this score. Indeed, in discussing the educational benefits to be derived from ethnic pluralism in the student body, he observed that both graduate and undergraduate "admissions decisions . . . are concerned with 'assessing the potential contributions to the society of each individual candidate following his or her graduation.'" If this assessment is permissible in the context of promoting educational ethnic diversity, as Justice Powell seems to assert, then it is difficult to see why he rejected with no explanation the same assessment in the context of curing underrepresentation in the professions. One explanation may be that he has attempted to save educational institutions from an excess of their own zeal. Couching the goal of diversity in terms of educational pluralism rather than curing underrepresentation may provide more legal insulation for educational judgments. The latter objective carries a much greater concern for numbers and probably requires an implementation model phrased more explicitly in terms of specific preferences than does the former. A school initially may be more comfortable with a more explicit model but in the process opens itself more readily to unwelcome external monitoring and external imposition of numbers than is at first discernible.

Another explanation for Justice Powell's avoidance of this rationale may be the danger of its being abused by conversion into an argument for proportional ethnic representation. He wrote extensively in his opinion about the difficulty of determining which ethnic subgroups were entitled to special consideration. If every group or subgroup were entitled to precise proportional representation,

then the entire admission process could be seen as a system of defined quotas that would tend to belittle individual initiative and achievement. For this reason, most persons relying on the underrepresentation rationale have attempted to limit its application to curing instances of gross underrepresentation or, stated affirmatively, to producing more than a token representation of identified groups.

Because four members of the Court have not addressed the validity of this objective while four others seem to have endorsed it, reliance on it is not precluded so long as the chosen method of implementation does not reach the extreme of a Davis-type quota plan.

2. Countering the effects of discrimination.

The Brennan group asserted that quota-type plans could be adopted by a state institution "if the purpose of such programs is to remove the disparate impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large." Justice Powell acknowledged the state's "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." The difficulty encountered in Bakke in his view was that the medical school faculty was not a body charged with responsibility for making findings of discrimination and fashioning remedies. He did suggest, however, that if it made appropriate findings, a duly authorized judicial, legislative or administrative body could tailor a remedy that would include even the use of quotas as redress for the affected group. This opens the possibility for schools to turn to the political process (e.g. state legislature or civil rights commission) for the necessary findings and tailoring of remedies.

Justice Powell disagreed with the Brennan group on three counts with regard to this objective. First, Justice Powell would require that the plan be instituted in response to "findings of constitutional or statutory violations." The Brennan disagreement emphasized that waiting for these findings would hamper voluntary efforts to comply with the law and that the position of a nonminority applicant such as Bakke is not materially affected by a finding of past discrimination against other racial or ethnic groups.

Secondly, Justice Powell observed that the University "does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." Again the Brennan group disagreed, arguing that under California law "the Regents can exercise plenary legislative and administrative power." The Brennan group could "find nothing in the Equal Protection Clause . . . limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the [California] Assembly."

Thirdly, in the Brennan group's view a program like the Davis program could be justified by the need to overcome the effects of societal discrimination that is not itself illegal. Justice Powell, on the other hand, seems to require legally prohibited discrimination as a basis for this objective. The distinction is clear in theory but may be of insignificance in practice. Any minority group that has been the victim of widespread societal discrimination is likely also to have been the victim of discrimination prohibited by law.

These disagreements leave important questions open. Primary are the questions of who has power to find and remedy societal discrimination and who has power to find and remedy institutional discrimination. For example, if an institution could find (as would easily be the case in many states which had segregated education systems) that it had discriminated in the past against certain minority groups, then it is unclear whether Justice Powell would still require external findings. If an institution chooses to base its program on the existence of societal discrimination, perhaps even reaching beyond the borders of the state, then the allocation of power to make findings and tailor remedies becomes even more problematical. With these difficulties, it is thus necessary to examine the purpose of the findings in an attempt to determine who can make them.

The central reason advanced by Justice Powell for requiring explicit findings of past discrimination is that these findings identify precisely the victimized groups, define the extent of the injury and thus specify the nature of the rights to be vindicated. Armed with these findings, the state in his view may undertake more extensive remedies to compensate victimized groups than would otherwise be permissible. Justice Powell stated that "isolated segments of our vast governmental structure are not competent to make these decisions, at least in the absence of legislative mandate and legislatively determined criteria." The reasons for and the scope of this conclusion probably revolve around the proposition that public oversight is necessary to ensure that the interests of majority group individuals are not overlooked in the process of vindicating interests of the minority. An open administrative hearing, on the record, controlled by legislative criteria, subject to both judicial and legislative oversight, would provide an opportunity for all interests to be heard. The public oversight function

thus might be satisfied if a Davis-type program were adopted in a public Board of Regents proceeding with attendant findings and opportunity for public comment.

Nevertheless, Justice Powell's formulation of the process may not allow a particular institution to make self-serving findings to justify its own race-conscious program. A process enclosed within the institution might not be as readily subject to public scrutiny nor as objective as a process depending upon an external group to make the findings and construct the remedy. For example, a state human rights commission could be asked to review a proposed admission plan that set seats aside for members of certain racial or ethnic groups. This commission could review the record of educational practices within the state or region, find from the evidence that past societal discrimination had resulted in disparate educational attainments among the designated racial or ethnic groups, and determine that the proposed plan would be an appropriate remedy to overcome the effects of societal discrimination. With this foundation, the institution might then be able to show that it was employing a remedial scheme that had been subjected to public and political scrutiny. Judicial review might then be limited to customary standards of whether the evidence in the record supported the findings and whether the remedy was appropriate for the circumstance. Educators must understand that none of the available mechanisms is likely to result in complete insulation of the policy from judicial review.

3. Service to minority communities.

Justice Powell "assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a

suspect classification." He found no evidence, however, that minority students were likely, solely because of their race or ethnic origin, to practice in underserved communities. A school choosing to pursue this objective, perhaps in support of an explicitly race-conscious admission policy, should be prepared to present data to show that minority graduates are more likely than nonminority graduates to assist underserved communities. This objective may be more relevant to service professions such as medicine, law and social work than to undergraduate schools, although the latter may have some stake in this goal both directly through work after graduation and indirectly in their role of providing graduates for the professional schools.

4. Promoting educational diversity.

Justice Powell perceived educational diversity to constitute a constitutional interest protected by the first amendment. This conclusion arises in two ways. First, academic freedom protected by the first amendment includes the authority to make judgments about selection of the student body. Secondly, the first amendment interest in a "robust exchange of ideas" is promoted directly by training the nation's future leaders in a pluralistic educational setting. Justice Powell quoted from Sweatt v. Painter, in which the Court held exclusion of blacks from a state law school when a separate state law school had been established for black students to be unconstitutional. "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." The academic freedom of the school thus becomes a compelling state interest through the first amendment.

This objective failed in Justice Powell's view to justify a quota-type plan, although he concluded that it could justify a "flexible" admission plan that attempted to achieve diversity on many factors in addition to racial and ethnic status. He quoted extensively from Harvard College's description of its admission program for the proposition that diversity in the student body can be achieved without assigning a fixed number of seats for which nonminority applicants are excluded from competing.

Again, we are constrained to caution that Justice Powell has only one vote among nine. As we will discuss below in reference to specific models, the Powell focus on educational diversity may cause problems for some schools. First, it assumes that a school is interested in seeking diversity on many factors and able to operate the model he described, assumptions that may not be true for some schools. In addition, he provided a list of personal characteristics that a school could consider important in diversifying its student body, and some question may remain of how far a school may deviate from that list in pursuit of protected first amendment goals. A school may be free to identify, in exercise of academic freedom, other qualities that it considers important but there may be limits to this freedom.

D. Models of Admission Programs

Every model for higher education admissions contains various factual components and is set in a legal climate that also contains many variables. Changing the number of designated seats in the Davis model from 16 to 15 would not be significant to a majority of the Supreme Court, but varying the committee structure or changing the legal climate by congressional amendment of Title VI might affect

the outcome. As the factual and legal variables change, the conclusions of each Justice may vary from case to case, depending on which variables are significant to that Justice. For example, the members of the Stevens group did not indicate which of the elements of the Davis model were controlling nor did they address the constitutional issues. Thus it cannot be predicted with certainty how these individual Justices would vote with regard to a slightly altered admission model or a model to which Title VI does not apply.

The following pages describe various models by isolating variables that might be legally significant. The possible variables include committee structure, designation of a specific number of seats or a desired range of minority admittees, presence or absence of certain evidentiary bases for administrative findings, invocation of a preference at the initial level of determining admissibility or at the final level of student selection, various types of numerical preferences and legal variables such as Title VI coverage or legislative action at either the state or federal level. In addition, each of these variables may have a different impact depending on the stage of the process from recruitment of students through receipt of applications, processing, decision making, award of financial aid, award of academic credit to graduation and even placement services.

It is not necessary to assess the possibilities for each variable at each stage of the process. Instead, this report describes models either commonly employed or invented as hypotheticals to illustrate the more important variables. The goal here is not to provide legal conclusions but instead to help establish a framework within which each school may evaluate its current approach and make any adjustments deemed advisable. First we turn to the two plans addressed in detail (although others were mentioned in passing) by members of the Court.

1. The Davis model.

The particular Davis plan before the Court can be characterized as the reservation of a designated number of places for members of specific minority groups, for which places a separate committee from the regular admission committee made the admission decisions. Thus the plan constituted a completely separated two-track system, which did not allow comparison of specially admitted minority applicants with nonminority applicants who presented equal or higher "benchmark" scores.

Both Justice Powell and the Stevens group referred to this model as an exclusionary system. To Justice Powell it excluded nonminority applicants from consideration for the designated seats. To the Stevens group it excluded Allan Bakke from participation in the medical school program because of his race. In the absence of further elaboration, it is difficult to speculate precisely which feature or features of the model could be altered sufficiently to escape the conclusion that this was an exclusionary system. Obviously, the fixed number of seats was a key element but there is no indication how much this element must be changed to pass legal muster. Among the possibilities are a more fluid "goal" number, a range of desired minority admittees and elimination of any numerical considerations. It is difficult to see how an admission officer or committee can exercise any degree of preference in a race-conscious admission program without some notion of how many minority applicants are desired in the final mix of the student body. Indeed, the Harvard plan described with apparent approval by Justice Powell specifically indicates that diversity "cannot be provided without some attention to numbers." Therefore, this problem is discussed in the examples below on the assumption that neither Powell nor all members of the Stevens group are

committed to the proposition that no numerical consideration is permissible.

Of course, even Justice Powell might uphold a plan like the Davis plan if appropriate judicial, legislative or administrative findings had been made to justify use of the model as a remedy for past discrimination. The requisites for this approach have been discussed above.

Neither Justice Powell nor the Stevens group placed any express emphasis on the presence of a separate committee for the special admissions, but the separate committee may nevertheless have legal significance because its presence emphasizes the distinct separation of a certain number of places on ethnic bases from the regular admission process. This factor is not likely to be conclusive; the Davis model probably would have been infirm in the Court's judgment even if operated entirely by a single committee. In somewhat altered models, the institution probably has room for discretion in structuring the decision making process, as indicated above.

2. The Harvard model.

Justice Powell stated with no degree of uncertainty his opinion that an admission committee could prefer applicants of certain racial or ethnic groups out of the total pool of applicants in an effort to create diversity within the student body. To describe this type of model, he quoted from the Harvard College description of its admission program and set out the full description as an appendix to his opinion. The difference to Justice Powell between this type of system and an exclusionary quota-type admission plan is that the applicant "who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all

consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." Justice Powell emphasized in at least two passages that the flexible approach would appear more fair to nonminority applicants and thus is more likely to be politically acceptable.

The difference between the Harvard and Davis models may be easier to state than to apply. Initially, a court may confront the difficulty of determining whether a school ostensibly employing the Harvard approach has in fact adopted a quota. Justice Powell acknowledged that the "flexible" system he advocated would be easy for a university to operate "as a cover for the functional equivalent of a quota system," but he indicated that good faith of the admission officers would be presumed in the absence of a showing to the contrary.

The Brennan group maintained that there was a deeper flaw in Justice Powell's effort to distinguish between the two approaches. They asserted that "there is no sensible, and no constitutional, distinction between" the two approaches. They observed that the Harvard model, "as those employing it readily concede, openly and successfully employs a racial criterion" to obtain minority students. "That the Harvard approach does not also make public the extent of the preference and the precise working of the system while the Davis system employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis 'quota.' . . . But there is no basis for preferring a particular preference program

simply because in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public."

Justice Powell responded to the Brennan argument as follows: "A facial intent to discriminate, however, is evident in petitioner's program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process."

The difference between the Powell and Brennan views may be less marked than might at first appear. It is clear that Powell would prohibit a plan that assigned a fixed number of seats to members of minority groups, but this does not mean that he would require schools to forego any consideration of numbers. As explained in Example 4 below, the Harvard statement specifically provides that the admission committee pays "some attention to numbers." Justice Powell may simply mean to require sufficient flexibility to permit some consideration of the special characteristics of nonminority applicants when the final admission decisions are being made and the composition of the entering class is being determined. This flexibility may be provided while the admission committee works with a given range of minority admissions in mind.

Neither the Harvard statement nor Justice Powell's opinion places any significance on individual disadvantage. Disadvantage on an individual level may be relevant in determining whether an applicant has shown special talents or motivation but it is not in the Powell approach a mandated factor in determining admissions. The goal of a school pursuing Justice Powell's formula is to promote

diversity along various lines, which could include both advantaged and disadvantaged students from various racial and ethnic backgrounds. Some dispute exists over whether selection of students based on individual disadvantage would result in increasing the number or percentage of minority students in an entering class. In either event, disadvantage at an individual level is irrelevant to the purpose of increasing the ethnic mix of a student body, and the Harvard statement specifically mentions the possibility that the son of a black physician may be preferred over other applicants.

Although individual disadvantage need not be taken into account in determining which applicants are to be preferred, there is some question whether schools must limit racial and ethnic preferences to members of disadvantaged groups. Disadvantage on a group basis presumably would be determined by which groups would suffer a disproportionate adverse impact, as a likely result of past discrimination, in the absence of a special admission program. The Brennan view might limit preferences to groups so defined.

3. Examples of other models.

Institutions of higher education in this country, and the schools within them, vary by innumerable factors including size, wealth, prestige, educational mission and applicant pool. Every school will have unique features in its admission program. Even if every school adopted the Harvard statement approved by Justice Powell, no two schools could operate it identically. The following examples highlight some of the more significant variables in the admission process as they relate to the Bakke issues.

Example 1: School A reserves 16 seats of the 100 in its entering class for members of designated minority groups.

The program operates in every significant respect as the Davis program did, but the school has assembled data to support the pursuit of objectives other than diversity in the student body. School A has taken this course for two reasons. First, its applicant pool is so large (thousands of applicants for 100 seats) that not every applicant can receive the individualized consideration described by Justice Powell without overtaxing the school's resources. Secondly, the disparity in academic credentials between minority and nonminority applicants is such that a comparison focusing on those credentials will result in admission of an insufficient number of minority students to serve the school's objectives. Therefore, the school has determined that a two-track system is necessary to achieve those objectives.

We have dealt above with identifiable objectives and the evidence needed to support each. Briefly stated, the Bakke decision leaves open the possibility of operating a Davis-type program either if findings of past discrimination have been made by an agency competent to make the findings and tailor a remedy or if the school can prove the likelihood of minority graduates serving minority communities. Less apparent but still possible are justifications flowing from the objective of curing underrepresentation in the professions.

Example 2: School B reserves 16 seats of the 100 in its entering class for members of designated minority groups. The program operates in every significant respect as the Davis program did, except that all decisions are made by a single admission committee.

The variable of committee structure probably is not of constitutional significance in this case. The program

appears to be as openly exclusionary as the Davis program regardless of who is making the decisions. The legal invalidity of the Davis two-track system probably flowed from the type of consideration given to applicants in each group rather than from the formal committee structure.

Example 3: School C determines that it wants to continue having at least 25 minority students in its entering class. The school has admitted 200 students each of the last five years, of which an average of 30 students have been minority students and at least 20 of those would not have been admitted had race not been taken into account. To achieve its goal of maintaining roughly these numbers the school decides to expand the entering class to 225 while reserving the newly created 25 seats for minority students. These 25 seats will be filled by a special committee established to review applications of minority students who are not admitted through the regular admission process.

The only difference between this program and the Davis program in Bakke is that the school can argue that it has not excluded nonminorities from consideration for every seat in the regular entering class and that the 25 extra seats simply would not exist were it not for the school's affirmative action commitment. As a functional matter, however, it is indistinguishable from the Davis program. Unless School C can make the kind of showing put forward by School G below, the reservation of 25 out of 225 seats for minority students still results in exclusion of nonminorities from consideration for those seats.

Example 4: School D sets a target range for its admission committee of selecting 10 to 20 minority students to obtain diversity in an entering class of 100. The admission procedure is unitary (a single committee makes all

admission decisions), and students are selected on the basis of predicted academic performance using a variety of factors as well as on potential contribution to the school and profession. To arrive within the target range of minority students, the admission committee takes race into account after assessing both predicted performance and potential contribution.

This approach differs from the Davis program in that (1) it does not employ two separate tracks through which applications are processed, one of which excludes applicants from groups other than the preferred minority groups, and (2) it offers its committee a range to work within, allowing comparative assessments of individual applicants to alter the precise number of students admitted from various groups. It is similar, however, to the Davis program depending on the degree to which the target range tends to exclude white applicants from consideration for those seats. Justice Powell seemed somewhat impatient with what he termed the "semantic distinction" between a quota and a goal, viewing each in the Davis context as a racial classification that excluded white applicants.

Most schools that have specified, with varying degrees of precision, the general number of minority students desired have argued that the school has made a special commitment to increasing the number of minority students and that this commitment should be measured rationally and coupled with a rational allocation of resources for this special purpose. Indeed, some have argued that a race-conscious admission program can be justified only if the school has undertaken a review of the number of minority students needed to provide educational diversity or to serve other purposes. This may not be the case for those schools that are still struggling to find and attract more

than a token representation of at least minimally qualified minority students. These schools have not yet reached the resource allocation problem.

Nevertheless, many schools are faced with a dilemma. On the one hand, the number of at least minimally qualified minority applicants, defined as those applicants capable of satisfactory completion of the educational program, exceeds the number needed for diversity or the number that can be accommodated given the school's resources. On the other hand, the number of minority applicants that would be accepted absent any preference is still insufficient. Under these circumstances, not every qualified minority applicant can be accepted but some must be accorded a preference. Many schools in this position have asserted that to operate the program in a realistic fashion, the selection authorities must have some target numbers in mind, perhaps expressed as a broad range rather than a specific goal. A portion of the Harvard statement not quoted by Justice Powell, following the portion asserting that the admission committee has not set quotas, states: "At the same time the committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers." We must now inquire how attention to numbers within a given range differs from an exclusionary quota or goal.

First, this system is distinguishable from the Davis system in that it does not separate applicants for consideration by different authorities. Justice Powell emphasized that minority applicants considered by the Davis Task Force were insulated from any comparison with nonminority applicants. School D's unitary system at least requires that the same decision-making body review all applications.

Secondly, this system does not give minority applicants two chances at seats for which nonminority applicants have only one chance. Justice Powell pointed out that nonminority applicants were excluded from consideration for the 16 Task Force seats in the Davis Medical School while minority applicants were eligible for consideration for all 100 seats. If School D considers all applicants together and counts all minority acceptances in approaching its target range, then the exclusionary treatment described in Bakke need not be found. In this system every applicant is considered for every seat while the admission officer keeps in mind the expectation that a certain range of those accepted will be from designated ethnic groups. Viewed in this way, the system differs from the Harvard model only in stating the numbers that reflect the school's general expectations with regard to diversity or some other purpose.

Finally, establishing a range does not totally exclude a nonminority applicant from consideration for specific seats so long as the lower end of the range is not an inflexible number. We do not mean to suggest, for example, that the Davis plan could be validly reinstated merely by announcing that henceforth the medical school would accept no less than 16 and as many as 30 minority students. Given the uncertainty of why the Stevens group concluded that the Davis plan excluded Bakke, it is possible that some members of that group would find a flexible range to be nonexclusionary.

Establishing the appropriate range for a given school demonstrates again the importance of specifying the purpose of the school's special interest in minority applicants. Harvard College stated a purpose of seeking an "environment that reflects the rich diversity of the United States," and presumably the admission committee there has in mind a

range approximating the minority population nationally. If diversity were sought for its classroom value, then a school would need to look at the structure of its own program. For example, if an entering class of 150 were customarily divided into four sections and approximately five minority students were thought to be necessary to provide educational diversity in each section, then the lower number for that school's range would be approximately 20 and the upper number could be set by exploring the relationship between the applicant pool and the school's other commitments. The purpose of increasing minority representation in the medical profession was rejected by Justice Powell but if the purpose of minority representation in certain professions can be documented adequately to satisfy a majority of the Supreme Court, then a professional school might target the range of students from various ethnic groups to meet the problem of unreasonable underrepresentation of that group in that profession. Similarly, if a school could document the tendency of minority graduates to serve minority communities, then it could target the range of minority students to reflect the level of each minority ethnic group in the population served by that school.

Example 5: School E is a state-supported school with a relatively small applicant pool, limiting its opportunity to be selective in admissions; it is required by state law to limit enrollment of nonresidents to no more than 15 per cent of the student body. School F is a small liberal arts college supported by a particular religious sect; it prefers applicants from that religious sect although some others are admitted who subscribe to the tenets of that sect without joining it. School G is a large private school that has analyzed its student body over the past few years and has found that, even though those students were admitted

primarily on the basis of quantitative predictors of academic performance, they also tended to show in the aggregate a broad array of characteristics and backgrounds. Each of these schools either has made an institutional decision that it is not interested in or is disabled from changing the existing diversity in its student body as a general rule, but each is interested in and committed to increasing diversity through a larger minority student enrollment.

Justice Powell assumed that a school, in the exercise of its academic freedom of selecting students, should encourage diversity on as many factors as possible. The question is whether he would require this approach. Seeking diversity on as many factors as possible may make sense for a school that serves a national market both in selecting and in placing its students, which has a large number of applicants with impressive predictive admission credentials, and which can be assured that many or most of the applicants it admits will in fact enroll at the school. But many schools are not blessed with a large number of applications from highly talented individuals from whom they must choose. In fact, it is likely that most undergraduate colleges will be faced with declining applicant pools in the future as the 18- to 24-year-old population group shrinks. Thus more and more schools may find themselves in the position of the three in our example, feeling no need to promote diversity on other than racial and ethnic factors. These schools will be attempting to enroll both minority and nonminority students with the best predicted academic performance plus an additional number of qualified minority students for diversity. Of course, as the number of minority students admitted on the basis of predicted academic performance goes up, the need for diversification through preferential admissions goes down.

Justice Powell provided a list of personal qualities that might be "likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." As pointed out earlier, Justice Powell's opinion need not be treated as the final word because some members of the Stevens group might vote with the Brennan group for less restrictive race-conscious admission programs. To the extent that his opinion is considered controlling, however, the question is how a school should proceed when it considers his listed qualities to be either irrelevant or otherwise satisfied yet the school considers racial or ethnic status important because it has little diversity on this factor in its current student body.

In the Powell formulation, two types of first amendment concerns blend easily because diversity on many factors is a healthy exercise of academic freedom. Stated another way, academic freedom easily covers the goal of promoting broad diversity but academic freedom alone may not protect the pursuit of diversity on solely ethnic bases. In this instance, it clashes directly with the individual's interests in equal protection under the fourteenth amendment. School F presents an additional countervailing first amendment interest in free exercise of religion, and it may be assumed that Justice Powell did not intend to address this situation.

School E may have the burden of showing that ethnic diversity alone is a legitimate state objective when the school is limited to any extent from seeking diversity on other factors. The second branch of the Powell first amendment analysis may provide an ample solution in itself,

since ethnic diversity in a student body directly promotes the first amendment interest of a national leadership trained in an ethnically diverse educational setting without regard to whether other forms of diversity also exist in the same student body. A school might also be able to demonstrate that conscious attention to ethnicity alone will have the corollary effect of producing diversity on personal qualities like those listed by Justice Powell, and this demonstration could justify reliance on ethnic characteristics as an indirect route to broader diversity.

School G is in a stronger position to make this argument since its applicant pool produces diversity on other factors without conscious effort in the admission process. Of course, the record on this fact should be made in advance by first determining the diversifying factors to consider, analyzing the existing student body and recording the presence of those diversifying factors. This school presumably could state a preference for members of certain minority groups without specifying the precise nature of that preference, allowing every applicant to compete for every seat but giving minority applicants an unquantified "plus" in this competition.

In summary, the Powell analysis probably allows race to be the sole conscious diversifying element when the student body is otherwise sufficiently diverse through the regular admission process or when it can be shown that the use of race will also produce diversity on other factors. Unrelated to these concerns, of course, a school may be able to justify explicit use of race on other grounds when it is pursuing a legitimate goal other than educational diversity.

Example 6: School H observes that the median score on quantitative academic predictors of its minority applicants is X points lower than the median score of nonminority applicants. To enable minority and nonminority applicants to be weighed roughly equally on other factors, it therefore adds Y (less than X) points to the scores of all minority applicants. The effect of this addition is to move a significant number of minority applicants from the "rejection" into the "discretionary" zone from which they can be admitted by decisions based on general evaluation. (This addition of points is not designed to remedy a fault in the prediction of academic performance. A school obviously may use different prediction formulae for different groups of applicants if this is necessary to achieve uniform validity.)

School J uses a formula much like the benchmark approach of the Davis Medical School. Every applicant receives a predetermined number of points for test scores and grades within certain ranges (e.g., 10 points for a 750-800 test score). Each applicant also receives points for such factors as having worked during school (e.g., 2 points for an average of 10 hours a week), graduation from a rural or inner-city high school, postgraduate work experience, residence status, a written statement (e.g. up to 20 points). Finally, the applicant may receive points for "affirmative action potential" based on ethnicity, sex or a demonstrated commitment to minority progress (e.g., up to 20 points).

Schools H and J are both adding points to quantified application data. School H adds points to the academic predictors in an effort to create racial and ethnic diversity within the discretionary applicant pool. School J adds points for ethnicity within a system that quantifies

both academic predictors and other factors. Each has an automaton character that could be offensive to both minorities and nonminorities, making them politically less acceptable than other approaches and raising the issues of racial neutrality and fairness that troubled Justice Powell. Justice Powell did speak of adding a "plus" for minority applicants, but only in the context of an applicant's "right to individualized consideration without regard to his race." In addition, if School H has a cutoff floor for quantitative predictors below which no applicant is considered except for minority applicants whose additional points bring them above that floor, then the system could be said to exclude nonminorities from any consideration when minorities in the same circumstances receive consideration.

The primary distinction between these systems and the Davis program, however, is that neither School H nor J has set aside a designated number of seats for which nonminority students may not even be considered. The number of minority applicants accepted will vary not only according to their own characteristics but also according to the characteristics of nonminority applicants. This feature may obviate the Stevens group's reliance on the exclusionary language of Title VI and meets Powell's insistence that any minority program be nonexclusionary toward nonminorities. The addition of points could be viewed as merely a formula method for adapting the subjective "plus" from a flexible, discretionary process to a highly quantified admission process.

Example 7: School K has determined that it wishes 20 percent of its accepted applicants to be members of certain minority groups. The school's research and experimentation show that it can achieve its goal by quantifying

each applicant's level of disadvantage on facially neutral factors such as parents' educational level to produce a disadvantagement index similar to the customary prediction index. The two indices are then weighted together in a formula that will produce the desired 20 percent acceptances. Various other studies have tended to show that economic disadvantage alone used as a factor in the admission process would not substantially increase minority participation because in current society educational achievement is bifurcated more on ethnic than on economic lines. School K, however, has consciously chosen other measures of disadvantage that will favor minority applicants.

There can be little doubt that the courts would allow a school to prefer disadvantaged applicants on a racially neutral basis, as the California Supreme Court suggested in Bakke. On the other hand, if the term "disadvantaged" is used as a mere surrogate for race, as it was in the Davis program, then the courts will ignore the fiction. What School K has done is the converse--create a formula in a racially conscious way but then applies it in a racially neutral way. The effect will be not only to achieve the desired percentage of minority students but also (1) to lower the mean of the quantitative academic performance predictors of the admitted minority students and (2) to deny admission to some minority candidates who are not disadvantaged as measured by the selected criteria. The rationale for this approach is that it is politically more palatable because of its tendency to favor disadvantaged nonminority applicants as well as minority applicants and thus it may be less divisive than explicitly race-conscious admissions.

This example introduces the problem of motivation for using a system that accomplishes indirectly what cannot

constitutionally be done directly. The case law on this point could be described as an almost impenetrable morass. Historically, courts have been reluctant to inquire into legislative or official motivation, but exceptions to this general rule have arisen in some instances of systems having a disproportionate impact on minority groups and producing an inference of unconstitutional discriminatory motivation. We might speak with confidence to an admission plan that designated 16 seats for applicants whose ancestors were slaves, but School K's less transparent device is more problematical. The program's validity may depend in part on the extent to which the criteria for defining disadvantage are also independently relevant to legitimate objectives of the school other than that of creating racial and ethnic diversity. Had the Supreme Court declared race-conscious admissions to be unconstitutional, there might have been need to look for facially neutral admission criteria that would have increased minority enrollment. The Court did not do so.

Example 8: Schools L, M, N and O conduct summer programs for students not otherwise admitted. Upon successful completion of the summer coursework, students may be admitted to the fall entering class. School L selects both minority and nonminority students for the summer program on the basis of various nonracial factors in the student's background. School M accepts only minority students for the summer program and awards no credit for the summer work. School N accepts only minority students for a program following their junior year (in high school or college, as the case may be) and then uses summer performance as one factor in the admission process the following years. School O accepts only minority students and awards academic credit on successful completion of the summer coursework.

School L does not appear to have created any racial classification and thus is not concerned with the Bakke constraints. School O is, of course, the most vulnerable to attack since it has created essentially a separate academic program for minority students.

Schools M and N are in a stronger position since they award no academic credit and use the summer program primarily as an admission tool. In the early days of these programs, they were justified on the basis of uncertainty about the relative validity of predictors such as test scores for minority students. Research now indicates that some standardized tests and other predictors produce no differential prediction. If this were true for schools M and N and if educational diversity were their only sustainable objective for race-conscious admissions, then these schools may need to show that there is no other method of selecting minority students that is less intrusive to the interests of nonminority applicants. In other words, the schools probably must show that the Powell-Harvard model does not work for them. One point to be made by these schools on this issue is that, without regard to the relative validity of normal academic predictors, performance in the summer program will improve the reliability of predictions for applicants who would otherwise be predicted to be higher risks than other students.

Summary. As these examples have demonstrated, most of the problems to be encountered in using models other than the Powell-Harvard approach arise when the school deviates from that model but still seeks to justify its program as serving the objective of educational diversity. If the legal and factual predicate for serving another objective can be laid adequately, then the school has more options open in selection of an appropriate model for its race-conscious admission plan.

4. Recruiting and academic services for minority students.

None of the opinions in Bakke addressed the validity of school expenditures for recruiting or providing academic services to minority students. These matters are relevant to the substance of this report but are somewhat tangential to the admission problem and we will treat them only briefly. Since recruitment activities do not involve the transfer of a tangible resource to a student, they are unlikely to be challenged in court. If they were challenged, a court might refuse to hear the case for lack of a cognizable injury to the plaintiff. Nevertheless, recruiting of minority students is substantially related to the objectives of any school's race-conscious admission program; it has even been mentioned by the California Supreme Court, among others, as an acceptable alternative to the special admission program itself.

Special Academic Support. Special academic support services do involve use of school resources for the measurable benefit of students chosen on the basis of race. It might be argued nonetheless that academic services for minority students, such as tutoring and counseling, relate directly to the objectives of race-conscious admissions. To the extent that minority students are admitted with lower predicted academic performance than their nonminority colleagues, the school may desire to help improve that performance through its educational program. This desire might be thought sufficient to justify special attention to these students. Justice Brennan, however, expressed concerns that race-conscious admissions not operate to stigmatize certain groups and that specially admitted students be expected to meet the same performance criteria for retention and promotion as other students. In response, it could be urged that while all proponents of race-conscious admissions have assumed that only qualified students would be admitted,

there is no reason to assume that predictions about relative performance will not be borne out to some degree. Therefore, special services for specially admitted students, designed to improve their academic performance, could be viewed as part of the school's educational mission just as other educational programs are individualized and tailored to the needs of certain groups.

Nevertheless, providing special academic support services to minority students while withholding them from nonminority students whose performance reveals that they are at least equally in need of those services might be stigmatizing in the Brennan view. Moreover, the drawing of a racial line in this setting seems contrary to the emphasis in Justice Powell's opinion on the importance of individualized treatment. Accordingly, a school might consider channeling special services to students chosen on factors other than racial or ethnic characteristics, such as performance in the early portion of the educational program.

FINANCIAL AID

An issue not raised in Bakke but closely related is the granting of financial aid. Some schools have set aside specific funds exclusively for minority students, other schools have stated that minority students will receive more scholarship assistance than other students with the same level of need and other schools have made no policy statements but assume that more financial aid would be necessary for minority students than for nonminority students.

The sources of law that may be brought to bear on issues of financial aid include federal statutes, federal constitutional principles and state laws. Not each of these sources applies to each type of financial aid. The legal posture of a financial aid program thus depends on whether it is a direct distribution of federal funds, school distribution of federal money designated for a specific purpose, expenditure of private funds in a private school, expenditure of funds from a private foundation affiliated with a public institution, expenditure of general funds by a public institution or distribution of state money designated for a particular purpose. Bakke is relevant to these various types of programs only insofar as federal law applies to each and to the extent that the case shows how some members of the Supreme Court view Title VI and the equal protection clause.

Turning first to distribution of federal money, either directly by the government or through the conduit of educational institutions, we find that the federal government has sponsored and funded several educational programs with a minority focus. These programs vary widely in their content and form, and we will not attempt to address the legal status of each. A school could rationally take the view

that whatever the government has undertaken is presumptively valid until shown otherwise. Some statement of their legal context, however, may be helpful.

For example, the Council on Legal Opportunity receives federal funds "for the purpose of assisting individuals from disadvantaged backgrounds . . . to undertake training in the legal profession." The program has primarily a minority focus, although nonminorities from chronically depressed areas such as Appalachia have received training and scholarships from CLEO. Similarly, the new Graduate and Professional Opportunities Fellowships are targeted primarily for "individuals from minority groups, especially from among such groups which have been traditionally underrepresented in colleges and universities and academic and professional career fields." The program also provides grants to institutions for academic support services for fellowship recipients. Other federal programs, such as some of the TRIO (Upward Bound, Talent Search and Special Services) programs, have a less explicit statutory minority focus but are often administered by HEW primarily for the benefit of minority students.

In the first place, to the extent that these programs are specifically authorized by Congress to take race into account, they presumably do not conflict with Title VI. If they are invalid the reason must be found in the Constitution. The programs might be challenged on the ground that nonminority students are excluded from consideration but defended on the ground that they are essential to the overall national goal of promoting educational diversity. These programs could have the added feature of being founded on the kind of legislative or administrative findings of past discrimination and remedial need that Justice Powell found to be lacking in the Davis program. These findings,

as discussed above, are important in showing that the rights of the majority have been considered through the political process. They may also serve to validate national goals in addition to educational diversity that might be offered in support of the racial preferences.

There are other federal programs of financial aid that are neither legislatively nor administratively directed toward minority students. For a school to administer these funds with a racial preference is more problematical. Setting aside a specific amount of these funds for minority students might be viewed by Justice Powell and members of the Stevens group as analogous to setting aside a specific number of places in the entering class. It might be argued, however, that to the extent a school is operating a valid special admission program, a minority set-aside for financial aid is valid as a necessary incident of the school's efforts to achieve its goal by attracting minority students. Because the rationale for financial aid distribution ties closely to the rationale for special admissions, perhaps the safest course is to model the financial aid program to be similar to the admission plan that the school has adopted.

Problems may arise under Title VI even though a school is not directly administering federal financial aid funds. In one case a federal trial court held that a private law school, administering its own financial aid funds, was subject to Title VI because federal money had been used in construction of the law school building. The law school had allocated 60 prcent of its financial aid to "disadvantaged" students. At the relevant time, only 11 percent of students at the law school were from minority groups and these students were automatically accorded "disadvantaged" status while nonminority students would be required to make a showing of special circumstances to qualify. The program

also made it possible, for example, that a minority student with a demonstrated financial need of $2,000 would be awarded more financial aid than a nonminority student with a demonstrated financial need of $3,000. The court held that this classification constituted discrimination prohibited by Title VI as well as the Constitution.

State financial aid programs in which funds are designated specifically for minority students may also be subject to challenge under the equal protection clause and under state law. If these funds are allocated legislatively with the kind of findings discussed above, then Justice Powell and the Brennan group might be satisfied. Otherwise, the line of defense most likely to succeed would be a showing that many minority students are likely to be in dire financial need and unlikely to matriculate without financial aid. The school's objective is not just to admit students but to enroll them.

INDIVIDUAL EXPOSURE TO LIABILITY

Persons involved in admission decisions may reasonably ask whether they could incur personal liability for these decisions. A short and inadequate answer is that almost any person in authority (in a public or private institution) may be sued for a wide range of acts and omissions. The first question is whether the suit would be likely to succeed. State laws on liability and immunity vary widely. The answer to this question will also depend on the facts of each case. It should be noted, too, that some institutions provide legal representation and indemnification for their employees. Because of this wide variation in state laws, no useful generalizations can be offered.

With respect to federal law, in suits against state employees and others acting "under color" of state law, a remedy is provided for a person deprived of his or her civil rights and recovery of damages is contemplated. The Supreme Court has set important limits on that remedy. In suits against state officials, the Court has held that they enjoy a qualified immunity from damage claims. That immunity is lost only when the official either knew or should have known that the challenged action would violate another person's civil rights or if the action was taken with a "malicious intention to cause a deprivation of constitutional rights or other injury." In one case the Court dealt with the liability of public school officials for alleged violation of students' civil rights. There the Court recognized that "if the work of the schools is to go forward," there must be a degree of immunity so that "public school officials understand that action taken in good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity."

Later in the same opinion, the Court added that an official would lose his immunity if he acted "with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

It is unlikely that action will be taken with malicious intent in the academic admission world. The critical questions in a suit for damages would be whether the official acted in good faith and whether he or she knew or should have known that the action taken was contrary to the Constitution or to a federal civil rights law. Given the uncertainty of the Bakke opinions on all issues save those directly before the Court, it seems unlikely that the courts would impose liability on an institution or individual who had engaged in a conscientious attempt to design a policy that would permit the use of race within the confines of the Bakke holding. In this instance, if the policy were later invalidated, the plaintiff would be entitled only to injunctive relief.

The status of private institutions of higher learning is less clear. Some courts have limited federal civil rights suits to challenges against public universities and those acts of private universities that enjoy direct state or local government support. Other courts have taken a broader view, holding that if the entire university received significant government funds, it and perhaps its employees may be sued in the federal courts under statutes such as Title VI even for non-publicly supported actions or programs. The current division of the courts on these questions and the variety of factual settings make generalization difficult. Presumably, to the extent that employees and officials of private institutions are subject to damage actions for violation of another's civil rights, they are

entitled to assert good faith defenses similar to those available to their counterparts in the public sector.

CONCLUSION

This report has been prepared to assist institutions of higher education as they conduct internal review of their admission policies in the wake of the Bakke decision. Despite the Court's apparent narrow holding and despite the fact that no Justice stated that race could never be taken into account in the admission process, a review of admission practices seems advisable because a majority of the Court has indicated that special admission programs must be tailored to serve identified legitimate objectives. The opinions in this case counsel careful appraisal of the structure of race-conscious admission programs. To facilitate and assist in this review and appraisal, this report has presented extended analyses of objectives and admissions models.

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